

Deo Chand

Vs

Shiv Ram

Civil Miscellaneous Petition No. 1223 of 1964

(Raghuvar Dayal, J. R. Mudholkar, S. M. Sikri JJ)

24.08.1964

ORDER

This application purports to be one under O. XLV, rr. 2 and 5 of the Supreme Court Rules and contain the following prayers :-

- (i) to direct the respondents to furnish security for delivering possession of the lands in dispute and for payment of mesne profits and costs which the petitioners might get in appeal;
- (ii) to restrain the respondents from transferring the lands in dispute or creating any change on the said lands pending the decision of the appeal in this Hon'ble Court;
- (iii) to send for the record of the case and get the record printed under the supervision of this Hon'ble Court;
- (iv) to order an early hearing of the case.

Prayers nos. (i) and (ii) appear to have been made in view of r. 5 which provides that nothing in the rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The respondents-decree holders have obtained possession of the land in suit, in execution of the decree in their favour. The petitioners did not take any action under O. XLV, r. 13(2), Civil Procedure Code, at the time the respondents-decree holders applied for execution. If they had applied to the High Court for the stay of execution, the High Court could have either allowed execution on taking security from the respondents for the due performance of any order which this Court might have made on the appeal or might have stayed the execution of the decree on taking security from the petitioners-appellants for the due performance of the decree appealed from or of any decree or order which this Court might make on the appeal. The question arises whether, after the decree has been executed and the decree-holders have been put in possession by the Court, this Court can put the respondents-decree holders to terms and direct them to furnish security for their delivering possession of the land in dispute and for payment of mesne profits, if the appeal succeeds and whether the Court can restrain the respondents-decree holders from transferring the lands in dispute, pending the decision of the appeal in this Court.

A notice of this petition was served on the respondents decree-holders, but they did not put in appearance.

Mr. Naunit Lal, for the petitioners, has referred us to some cases and to the provisions of the Code of Civil Procedure, in this connection. Reliance is chiefly placed on the case of *Mst. Jariutool-Butool v. Mst. Hoseinee Begum* (10 M.I.A. 196) which was followed by the Madras High Court in *Narayanan Chetti v. Arunachallam Chetti* (I.L.R. 19 Mad. 140) and by the Bombay High Court in *Khushaldas Gokuldas v. Chimanlal Kalidas* (I.L.R. 50 Bom. 453) in a case which came before it after the enactment of the Code in 1908. In the Privy Council case, the Privy Council expressed the opinion that the Sadar Dewani Adalat was competent to require the decree-holder to furnish the security or otherwise to provide for the protection and security of the property in question pending the appeal, notwithstanding that execution had issued before the appeal was admitted. Their Lordships of the Privy Council did not express themselves with respect to the reasons for the view and simply stated that they had felt some difficulty in dealing with the case, but on examining the Regulations and considering the nature of the case, they were of opinion that an order might be made upon the application. The Regulations referred to in the submissions before their Lordships were the Bengal Regulation XVI of 1797, Bengal Regulation XIII of 1808, section II, clause (3) and Bengal Regulation V of 1798, sections V and VI. Section II of the Bengal Regulation XVI of 1797 provided for persons desirous of appealing from a judgment of Sadar Dewani Adalat to the King-in-Council to present their petition of appeal to the court of Sadar Dewani Adalat which was empowered to admit the appeal and proceed upon it as directed in the following sections of that Regulation, under the several restrictions therein prescribed. Section IV of the Regulation provided :

"In cases of appeal to his Majesty-in-Council, the court of Sudder Dewanny Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed for the party in whose favour the same may be passed for the due performance of such order or decree as his Majesty, his heirs or successors, shall think fit to make on the appeal, or to suspend the execution of their judgment during the appeal, taking the like security in the latter case from the party left in possession of the property adjudged against him."

We find nothing in these provisions which empowered the Court of Sadar Dewani Adalat to demand security from the respondent-decree holders or to restrain them from transferring any property over which they had obtained possession in execution of their decree before an appeal was taken to the Privy Council.

Section IV, however, directed the Sadar Dewani Adalat to allow the execution of the decree on taking sufficient security from the decree-holder. In the case before the Privy Council no such security had been taken and therefore it may be said that the Court was held to be competent to cover up its default by ordering the security to be furnished by the decree-holders even after the decree had been executed. Bengal Regulation XIII of 1808 dealt with the procedure in cases which were appealable to the Court of Sadar Dewani Adalat and could not possibly have said anything in connection with the appeals to the Privy Council from the orders of the Sadar Dewani Adalat. Section V of Bengal Regulation V of 1798 provided for the applicability of the principles of the rules contained in ss. III and IV to cases in which the possession of property was ordered to be transferred by the decree of any court of justice and from which decree an appeal might be pending in a superior court including his Majesty-in-Council. Section III of the Regulation empowered the courts of appeal to require further security during appeals if the security already taken from the appellant for the stay of execution of the decree be found to be insufficient and in case of the failure of the appellant to furnish further security to allow the execution of the decree, on taking requisite

security from the respondent. Section IV of the Regulation made the transfers by the appellant, pending the appeal, to be null and void.

We do not see how these provisions of ss. III, IV and V of Regulation V of 1798 could have been any guide in the matter before the Privy Council. Section VI of this Regulation provides for the attachment of the property in case neither of the parties were able to furnish security. This provision, again, could not have been of any help in determining the question whether the High Court could require the decree-holders to furnish security after the decree had been executed.

Order XLV, C.P.C., deals with matters in connection with appeals to this Court. Rule 13 deals with the powers of the Court whose decree is under appeal, during the pendency of that appeal, and reads :

"13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

(2) The Court may, if it thinks fit, on special cause shown by any party interest in the suit, or otherwise appearing to the Court, -

(a) impound any movable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent, as the Court thinks fit for the due performance of any order which the Supreme Court may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any decree or order which the Supreme Court may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeals, as it thinks fit, by the appointment of a receiver or otherwise."

It is clear from sub-r. (1) that unless the Court otherwise directs the decree has to be unconditionally executed. Naturally, directions of the Court must be given before the execution of the decree. If no directions are given, the execution of the decree is unconditional, which means that the decree-holder executes the decree without any conditions attached and, after executing the decree, can deal with the property he has obtained on such execution, in such manner as the law allows him to deal with it. Sub-r. (2) lays down the circumstances in which the Court can give directions with respect to the subject matter of the suit, including the execution of the decree. Clauses (b) and (c) provide respectively that security may be taken from the respondent for the execution of the decree and that the execution of the decree may be stayed on taking security from the appellant for the due performance of any decree which this Court might make on appeal. Such a direction for security for the due performance of the order eventually passed by this Court is to be given when the Court is dealing with the question whether the execution of the decree be allowed or be stayed. The sub-rule does not empower the court to give such a direction subsequent to the execution of the decree. Even the giving of such directions, when dealing with an application for execution, is dependent on the satisfaction of the court that some special cause exists for giving those directions. The provisions of r. 13 emphasize that the decree-holder has, ordinarily, full right to execute the decree unless, on

special cause being shown, the court orders him to furnish the security contemplated by cl. (b) of sub-r. (2). Rule 14 provides for the increase of the security furnished by either party when it is found to be inadequate. If the appellant fails to deposit the additional security ordered, the decree is to be executed and if it is the decree-holder-respondent who defaults to furnish the additional security, the court can stay the further execution of the decree and restore the parties to the position in which they respectively were when the security which appeared inadequate was furnished or give such directions respecting the subject-matter of the appeal as it thought fit. The rule comes into play only when security had been furnished in the first instance by the decree-holder-respondent or by the judgment debtor-appellant and does not deal with cases where execution had been allowed by the Court without imposing any condition. The legislature could have provided in this rule or any other rule for the court demanding security afresh if circumstances came into existence during the pendency of the appeal providing justification for the demand of security from the decree-holder-respondent who had executed his decree. It does not so provide.

So far we have been dealing with the powers of the High Court and the courts from whose orders, appeals, be pending in this Court. We have not been referred to any decision of this Court in which this Court had ordered any decree-holder to furnish security for the due performance of the decree that might be passed by this Court when the decree-holder had already executed his decree. Nor have we been referred to any provision of law dealing with this question. Order XX, r. 1, Supreme Court Rules, however deals with the question of staying the execution of a decree and reads :

"The filing of an appeal shall not prevent execution of the decree or order appealed against but the Court, may, subject to such terms and conditions as it may think fit to impose, order a stay of execution of the decree or order, or order a stay of proceedings, in any case under appeal to the Court."

There is no rule which provides for this Court's giving directions in connection with the execution of the decree. In fact, no such occasion can arise as the decree-holder is free to execute his decree and the powers of the court whose decree is under appeal, in connection with the execution application, are laid down in O. XLV, of the Code.

Order XLV, r. 5, of the Supreme Court Rules, simply provides that the inherent powers of this Court, to make necessary orders to meet the ends of justice or to prevent abuse of the process of the Court, are not affected by the rules. Mr. Naunit Lal has not urged that the reliefs prayed for with respect to the demanding of the security from the respondents or restraining them from transferring the property, were to be granted in the exercise of the inherent powers of this Court. The existence of such an inherent power would be a matter of grave doubt when the Code sufficiently deals with the right of the decree-holder to execute the decree and the powers of the High Court to give directions in connection with such execution. No occasion for the exercise of any inherent power can arise when the High Court itself does not give any such directions and had not been asked by the judgment-debtor appellant to stay the execution of the decree. To exercise any such inherent power would be not for the prevention of the abuse of the process of the Court but may be to encourage it inasmuch as the judgment-debtor who had been in default in taking necessary action at the proper time would be encouraged to ask for that action after the execution of the decree and during the pendency of the appeal in this Court. Law contemplates transfers by a party pending litigation, does not prohibit them but makes them subject to the result of the litigation. To pass orders restraining a party in possession delivered by the Court cannot, prima facie, be in the interests of justice.

We are therefore of opinion that the aforesaid reliefs cannot be granted after the decree-holders had been put in possession of the property in suit in due execution of their decree. We may note that the failure of the appellants to obtain such reliefs from this Court need not necessarily prejudice them in case they succeed in the appeal. Any transfers of the property in suit made by the respondents-decree holders during the pendency of the appeal would be subject to the law of lis pendens. The appellants would be entitled to recover such mesne profits, as the law allows, from the respondents for the period of their possession. We therefore reject this application with respect to the reliefs mentioned in clauses (i) and (ii) of para 11 of the application.

We have not considered whether any other relief, for the protection of the interests of the petitioners-appellants, can be granted, as no other relief in that regard had been sought.

With respect to the prayer in clause (iii), we order that the record of the case be sent for and the papers for use of this Court be printed under the supervision of the Registrar.

With regard to the prayer in clause (iv), the petitioners-appellants can take proper steps after the printing of the record.

Prayers 1 and 2 of the petition rejected.

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